NO. 46091-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

BRUCE LEE FRITZ, Petitioner

CLARK COUNTY SUPERIOR COURT CAUSE NO. 10-1-00389-4

RESPONSE TO PERSONAL RESTRAINT PETITION

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A. IDENTITY OF RESPONDENT AND AUTHORITY FOR RESTRAINT

The State of Washington is the Respondent in this matter. Mr. Fritz is restrained pursuant to the judgment and sentence of the Clark County Superior Court dated September 14, 2010, under cause number 10-1-00389-4. The judgment and sentence is attached at Appendix A.

B. STATEMENT OF THE CASE

Between January 1, 2008, and March 13, 2010, Bruce Lee Fritz repeatedly raped and molested his fiancée's daughter, L.M.F. (CP 3-6, RP 124-42). L.M.F. was between the ages of six and eight years old at the time. (RP 131). The defendant was between the ages of thirty-two and thirty-four years old. (CP 6).

I. Procedural History

The State of Washington charged the defendant by amended information with four counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree. (CP 3-6). In addition, the State alleged two aggravating factors for each count, to wit: that the acts were part of an ongoing pattern of sexual abuse with a minor and that the defendant used his position of trust to facilitate the crimes. (CP 3-6).

Trial commenced on August 2, 2010. (RP 49). L.M.F. testified at trial. (RP 125). Prior to trial the court held a hearing, pursuant to RCW 9A.44.120, in which it found L.M.F. was competent to testify and her out-of-court statements to her mother, her grandmother, Vancouver Police Department Detective Aaron Holladay, and pediatric nurse practitioner Marsha Stover were admissible as evidence at trial. (RP 74-76).

On August 4, 2010, following trial, the jury found the defendant guilty of all charged counts. (CP 41-46). In addition, the jury found the State had proven the presence of each aggravating factor for each count. (CP 47-58).

II. Evidence Presented at Trial

L.M.F.'s mother, Regina Rae Fowler, testified that she loved the defendant, the two were engaged to be married, the defendant was a father-figure to her daughter, and L.M.F. used to call the defendant, "dad." (RP 159-61). Fowler testified that she and L.M.F. moved in with the defendant in 2008. (RP 158, 160). The three first lived in an apartment and they later moved into a house. (RP 158, 160). Fowler said, during this time, she was attending college and she was working the graveyard shift at her work. (RP 160-61). Consequently, there were many occasions in which Fowler left her daughter home alone with the defendant and under

the defendant's care. (RP 161). Fowler said she trusted she could leave L.M.F. in the defendant's care. (RP 161).

Fowler said, on March 13, 2010, after L.M.F. and the defendant returned from church, L.M.F. asked her mother if she could speak to her alone in the bedroom. (RP 165-66, 194). L.M.F. stood next to the bed holding her legs and crying. (RP 166). Fowler assured L.M.F. she could tell her anything. (RP 167). L.M.F. told Fowler the defendant "tries to have sex with me." (RP 167). Fowler asked L.M.F. if she was sure and if she was telling the truth. (RP 167). L.M.F. responded affirmatively to both questions. (RP 167). L.M.F. told her mother the defendant tried to have sex with her fifteen times or more. (RP 168).

Fowler did not ask any other questions of her daughter. (RP 190). Instead, she confronted the defendant who was in the garage. (RP 167-68). The defendant initially denied any misconduct with L.M.F. (RP 167-68). The defendant started crying soon thereafter. (RP 169). Fowler dropped her daughter off at her grandmother's house that night. (RP 170). The following morning, Fowler told the defendant she "needed closure." (RP 172). She asked the defendant "what he did to [L.M.F.]?"[1] (RP 190). The defendant cried again. (RP 172). He told Fowler that he "rubb[ed] his

[1] Fowler testified she did not ask the defendant anything more specific than "what he did to L.M.F." because she did not know any details of the sexual assaults at that time. (RP 190).

penis on [L.M.F.'s] privates" - - "he rubbed his penis on her "butt." (RP 172, 189). He said he did it "just twice." (RP 172). Fowler left the house and later called 911. (RP 173, 188).[2]

Fowler testified, before her daughter told her about the sexual assault, she took L.M.F. to the doctor because L.M.F. had complained "about her private hurting." (RP 176). The doctor lifted up L.M.F.'s underwear and concluded, "she's fine." (RP 177).

Vancouver Police Department Detective Aaron Holladay also testified at trial. Holladay interviewed L.M.F. on March 14, 2010, regarding the sexual assaults. (RP 272, 278). Holladay spoke to L.M.F. privately at Luce's home. (RP 272, 278). Holladay has been employed with the Vancouver Police Department for thirty years. (RP 273). Holladay is trained in conducting forensic interviews with children and has interviewed at least one thousand children. (RP 273-75).

Prior to interviewing L.M.F., Holladay asked L.M.F. to identify the anatomical parts on a cartoon drawing of a human body. (RP 282). L.M.F. correctly identified the anatomy on the picture. (RP 284-86).

Pursuant to his training, Holladay asked L.M.F. non-leading, non-suggestive, open-ended questions, such as "what do you think is the reason I am here?" (RP 274, 281). L.M.F. responded, "probably because

[2] Fowler testified, even at this time, she was not on bad terms with the defendant. (RP 173).

of my dad." (RP 281). Holladay asked L.M.F., "did your dad do something he's not supposed to?" (RP 281). L.M.F. responded, "he had S-E-X with me." In response to a series of non-leading and non-suggestive questions, L.M.F. provided the following information: L.M.F. said the defendant had been having "S-E-X" with her since she was six years old. (RP 282). "I'm eight," L.M.F. said, "that's two years." (RP 282).[3] L.M.F. said the first time the defendant had sex with her was at their old apartment in her bedroom. (RP 286). The defendant came into her bedroom and took her clothes off. (RP 287). She said "he took his clothes off and licked my crotch with his mouth." (RP 287).

L.M.F. said, another time, after taking her clothes off in her bedroom, the defendant and L.M.F. were in the bathroom and "he tried to stick his wiener in my bottom...[h]e was trying to put me on the floor and I was screaming and crying...[a]nd then he tried to stick it in...[i]t hurt really bad and he told me to shut up and just relax." (RP 287).

L.M.F. described separate incidents that happened on the couch and in the defendant's bedroom. (RP 287). She said, "[o]n the couch and in the bedroom he tries to kiss me on the lips...he likes to kiss me on the neck in his bed...[h]e was trying to go up and down on me and put his

[3] L.M.F.'s birthday was on May 17. (RP 127).

wiener in my crotch." (RP 288). She said he took her clothes off when this happened. (RP 288).

L.M.F. said the defendant would put on a "blue and green stripes robe" and his penis was "sticking straight up" during these incidents. (RP 288-89). L.M.F. said "[i]t's the same thing...[h]e likes to kiss my body all over." (RP 286). She said, the defendant liked to lick her "on my bottom," "my boobs," "[m]y crotch." (RP 289). She said, "[h]e tries to put his wiener in me and that's when the liquid was coming from his wiener." (RP 290). L.M.F. said the liquid "was a milk liquid that looked liked pus and he said it makes him feel like pleasure." (RP 291). She said the liquid would go "[o]n my bottom and on my crotch." (RP 291).

L.M.F. described pornographic videos that the defendant showed her "in his bedroom...with the door shut." (RP 292). She said, when they watched the videos "[h]e likes to make the liquid come out...from his wiener." (RP 293). After the liquid came out, L.M.F. said the defendant "gets a black rag and he cleans it." (RP 293).

L.M.F. said the defendant would spit on his hand and then, with a physical gesture, she described the defendant stroking his penis. (RP 293). She said, "[a]nd then he likes to put it back in...[into] my crotch." (RP 294).

Detective Holladay made a representation of a vagina with his two fingers. He explained the outside and inside of his fingers. (RP 290). Holladay asked L.M.F., "when her dad's wiener touched her, if it touched her inside or outside?" (RP 290). L.M.F. said "it was inside." (RP 290). She said, "it only went halfway." (RP 290).

L.M.F. said the defendant did these things to her "a lot…like twenty times" at the apartment and "at least thirty times" at the house. (RP 290, 291). L.M.F. said, at the apartment, it happened in her old bedroom, in the bathroom, in the defendant's bedroom, and on the couch. (RP 286-87). When they moved into the house, it happened "[o]n the couch, in my bedroom, in the living room, and on my dad's bed." (RP 291). "He touches me with his mouth, his wiener and his fingers and he touches me inside." (RP 292). L.M.F. said it had been six or seven days since the defendant had done these things to her. (RP 292).

Detective Holladay asked L.M.F. if the defendant ever took pictures of her. (RP 292). She said "no." (RP 292). Holladay asked L.M.F. if the defendant ever showed her things on the internet. (RP 293). She said "no…I was on the computer and I was trying to look up on the computer how to stop dads from having S-E-X with little girls and he caught me and told me not to tell anybody." (RP 293-94). L.M.F. said the defendant did these things to her when "my mom's not there." (RP 282). She said she

never told anyone because "he told me if I told my mom or the police I would never be able to see my family again." (RP 288).

L.M.F.'s grandmother, Darvie Luce, also testified at trial. Luce testified she was fond of the defendant, she was close with L.M.F., and the defendant was a "dad" to L.M.F. (RP 193-95). L.M.F. and her mother lived with Luce prior to 2008, when they moved in with the defendant. (RP 203, 205). Fowler dropped L.M.F. at Luce's home on March 13, 2010. (RP 194). Luce asked L.M.F. "what's going on with you guys?" (RP 197). L.M.F. began to share information with her about the ongoing incidents with the defendant. L.M.F. told Luce the defendant started doing these things to her when she was six years old and living at the "old apartment." (RP 196). She described the defendant rubbing his penis on her and trying to stick his penis inside her. (RP 196). L.M.F. told Luce about the "rag" that the defendant would use to wipe off "that milky white stuff that big people leave on you." (RP 196, 198). L.M.F. told Luce about a time when the defendant "licked her" on the vagina and kissed her thighs. (RP 197-98). L.M.F. said it "tickled" when he licked her "private part." (RP 200). L.M.F. also said, every time the defendant would do these things to her, he would wear a blue-striped bathrobe and his penis would be "sticking up" underneath. (RP 200). L.M.F. told Luce about a time when the defendant put his penis in her mouth and tried to "shove it down

her throat." (RP 199). L.M.F. told Luce about the "big people" movies that the defendant made them watch. (RP 199). She told Luce the defendant would try to do the things in the movies to her. (RP 199). L.M.F. said the defendant told her she would never see her family again if she told anyone. (RP 200). Luce testified she never probed L.M.F. for information; rather, she said to her, "if you want to talk about it is fine. If you don't, you don't." (RP 199).

Marsha Stover, a pediatric nurse practitioner who specializes in genital exams and treating child victims of sexual abuse, also testified at trial. (RP 235-237). Stover physically examined L.M.F. on April 22, 2010, (approximately one and one-half months after L.M.F. reported the abuse). (RP 242). Stover interviewed L.M.F. prior to the examination. (RP 244). Stover said she asked L.M.F. only open-ended, non-suggestive questions, such as: "well, what happened?" (RP 245). L.M.F. told Stover the sexual assaults started when she was six years old. (RP 245). She said Fritz did "grown up stuff with me, S-E-X." (RP 245). She said he "tried to stick his wiener in me." (Id.) She said it "hurt" when the defendant tried to stick his penis in her.[4] (RP 245). L.M.F. described the defendant going "up and down" on her with his penis; she described him "kissing and licking her"

[4] Stover testified the hymen is inside the labia minora. (RP 247). She said the hymen is very elastic and it heals quickly; consequently, it would be very unusual to see signs of a sexual assault on a child. (RP 248-49). However, Stover testified it would be extremely painful to a pre-pubescent child to have her hymen touched. (RP 252).

all over her body, including her legs and "private parts." (RP 246). L.M.F. described the defendant trying to "spit on her with his wiener" and then putting his "hands on it" and "rub[bing] it." (RP 245). L.M.F. said he always "put on his robe" before he did these things to her. (RP 246). L.M.F. said she knew she had to tell her mom when she saw the defendant put his robe on again and she knew her mom was leaving that night. (RP 246). L.M.F. said, "I could see it in his eyes and he put on his robe. He always put on his robe." (RP 246).

Ms. Stover testified that the hymen is similar to the skin inside your cheek, in that it can heal rapidly following trauma. (RP 248). She testified that most of the time, you would not find any injury to a young girl's vagina if it had been penetrated. (Id). She testified that only in the most severe trauma will the hymen have the remnant of a tear months down the road. (RP 249). This opinion is generally accepted in the scientific community. (Id). She has examined 80 to 100 girls who have reported penetration and found physical evidence of penetration in only three cases. (RP 249-50). She testified this could be because the area heals up quickly, because the penetration actually did not happen, or because there is a delay in reporting. (RP 250). It would be significant to her, while examining a child, that no sexual abuse had occurred for a period of month prior to the examination. (RP 251). A "normal finding" means either that

sexual abuse did not occur, or there was sexual contact but no injury, or that the injury had healed up. (RP 251).

In her examination of L.M.F., Ms. Stover found no indication that her vagina had been penetrated. (RP 253). She offered no diagnosis. She testified that her finding was consistent with what L.M.F. had reported to her. (RP 254). This testimony was not objected to.

L.M.F. testified at trial approximately five months after she initially reported the abuse. (RP 125). L.M.F. was nine years old and was in the third grade when she testified. (RP 126-27). Consistent with her previous accounts, L.M.F. described multiple sexual assaults where the defendant "put his wiener inside of [her]," "[inside her] bottom," and... "in[side] [her] front part." (RP 134). She described the defendant "putting his tongue" on her "private parts" and touching her with his hands all over her body. (RP 136). She said sometimes he would only lick her "private part," sometimes he would only touch her "private part," and sometimes he would only "stick his wiener" inside her. (RP 138-39, 141). She said it "tickled" when he licked her "private part" and "it hurt" when the defendant put his penis inside her. (RP 135, 143). L.M.F. described the pornographic videos the defendant showed her and the "black cloth" he used to "wipe" her on her "bottom" "after he was done." (RP 143). L.M.F. described the defendant's penis as "pink and white." (RP 142).

L.M.F. again stated the sexual assaults started when she was six years old and they always happened at home (in his, in her bedroom or in the bathroom), when her mother was not home. (RP 137, 140). L.M.F. said the assaults happened more than ten times when they lived in the "old apartment" and they happened more than ten times when they moved into the house. (RP 136, 140). L.M.F. said she finally told her mother about the sexual assaults because she learned at church that "if child molesters hurt little kids or boys or girls, they will be in trouble with God." (RP 155).

On cross-examination, defense counsel asked L.M.F. if she had ever seen the people in the videos licking each other. (RP 146). L.M.F. said she had not. (RP 146). Defense counsel asked L.M.F. if there were a lot of black wash cloths around the house. (RP 156). L.M.F. said there were not. (RP 156). Defense counsel suggested perhaps L.M.F. had seen the defendant and her mother having sex. (RP 153). L.M.F. said she only knew that the defendant and her mother had sex "because he told me."[5] (RP 153).

C. ARGUMENT WHY PETITION SHOULD BE DISMISSED

A personal restraint petition is not a substitute for a direct appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103

[5] The facts pertaining to closing argument will be discussed in the argument section of this brief.

(1982). A personal restraint petitioner must prove either a constitutional error that caused actual prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

In a personal restraint petition, petitioner bears the burden of showing prejudicial error. *State v. Brune*, 45 Wn.App. 354, 363, 725 P.2d 454 (1986); *In re Pers. Restraint of Monschke*, 160 Wn.App. 479, 489, 251 P.3d 884 (2010). Bare allegations unsupported to citation to authority, references to the record, or persuasive reasoning cannot sustain this burden of proof. *Brune* at 363. The petitioner must support the petition with the facts upon which the claim of unlawful restraint rests, and he may not rely solely on conclusory allegations. *Monschke*, supra, at 488; *In re Personal Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990); RAP 16.7(a)(2)(i). When the allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. *Monschke* at 488; *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). If the petitioner fails to make this threshold showing then he cannot bear his burden of showing prejudicial error. *Monschke*, supra, at 489.

In evaluating personal restraint petitions, the Court can: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

Because a personal restraint petition is not a second bite at direct appeal, "new issues must meet a heightened showing before a court will grant relief." *In re Yates*, 177 Wn. 2d 1, 17, 296 P.3d 872, 880 (2013).

I. ISSUE ONE

In this claim of error, the defendant claims that the victim's fleeting reference to the role her religion played in her decision to disclose the rapes she had suffered, which was elicited in response to his cross examination in which he opened the door to this line of questioning, denied him due process. Fritz is wrong.

The following excerpts from the transcript are relevant to this claim of error. In cross examining L.M.F., Fritz sought to impeach her by showing that she failed to disclose the sexual abuse to a number of people

in her life, to include her mother, her grandmother, her babysitter, her neighbors, her future step-brother (Fritz's son) and her male doctor at Kaiser Permanente. RP 148-52. In response, the prosecutor asked L.M.F. about the timing and reason for the disclosure:

> Prosecutor: "And, the day that you told, who did you tell first?"
>
> L.M.F.: "My mom."
>
> Prosecutor: "And, why did you decide to tell your mom that day?"
>
> L.M.F.: "Because she was the only one there."
>
> Prosecutor: "Okay, but why did you pick that day to tell your mom?"
>
> L.M.F.: "Because God told me to."
>
> Prosecutor: "God told you to?"
>
> L.M.F.: "Yes."
>
> Prosecutor: "And, why do you say that, L.M.F.?"
>
> L.M.F.: "Because, I don't know, my nanny told me that sometimes God watches for you."

At this point, defense counsel objected to the relevance of the previous question. He did not assert that the prosecutor was bolstering. The objection was overruled. RP 154-55.

The prosecutor then asked: "Was there anything that happened that day to make you feel like God was telling you to tell that day?" L.M.F. said she got the idea at church that day, after reading in the Bible

that child molesters will be in trouble by God. RP 155-56. Fritz did not object to this testimony.

This line of questioning, and L.M.F.'s response, was proper. It is a basic tactic in sexual assault cases to attack the victim on the manner and timing of the disclosure. When a victim fails to disclose in a timely fashion, or fails to disclose to people she claims to trust, it can arguably support the inference that she or he is lying. In response to such an attack, the prosecution is entitled to question the victim about why she disclosed when she did. Fritz argues that any reference to God, church, or religion, no matter the context, constitutes the State bolstering the victim's credibility by proffering her as a moral, religious person. He argues that the State invoked the "fundamental tenets of the Christian religion, God, and the Bible as part of Mr. Fritz's prosecution." This is nonsense. The State's questioning of the victim on the circumstances of her disclosure was entirely invited by Fritz. At trial, Fritz only objected to one of the prosecutor's questions based on relevance--not bolstering, the claim he asserts here. He did not object at all to testimony from L.M.F.'s mother that L.M.F. told her that God told her (L.M.F.) to tell. RP 170. Notably, Fritz does not cite to a single Washington case to support his argument.

The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the

State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The lack of an objection here shows both that the remarks were of minor moments in the overall trial, and a recognition on Fritz's part that he invited this testimony. Fritz cannot complain about testimony to which he opened the door. See generally, *State v. Avendano–Lopez,* 79 Wn.App. 706, 714, 904 P.2d 324 (1995).

Fritz has not demonstrated error, much less prejudicial error under the standard for a personal restraint petition. This claim should be dismissed.

II. ISSUE TWO

Fritz claims he was denied effective assistance of counsel when his attorney failed to object to the testimony complained of under Issue One. But as shown above, this testimony was not erroneous. Religion was not used to bolster L.M.F.'s credibility, and the testimony was invited. Fritz cannot show deficient performance for failing to object to testimony that was not objectionable. Moreover, as noted above, the decision whether to object is left to the sound discretion of trial counsel because he is the one in the courtroom--the one in the best position to evaluate the prejudicial

effect of testimony and to decide whether an objection would merely highlight testimony rather than cure it. As noted in the sections below, hindsight has no role to play in determining whether counsel was effective.

Because Fritz does not demonstrate this testimony was erroneous, his claim of ineffective assistance of counsel necessarily fails.

III. ISSUE THREE

In this claim of error Fritz claims that Nurse Practitioner Marsha Stover diagnosed L.M.F. as having been a victim of sexual abuse and that his attorney failed to object to such testimony. Thus, he claims he received ineffective assistance of counsel. Because the premise of his claim is incorrect, the claim fails.

Defense counsel objected before trial to Nurse Stover offering a diagnosis that L.M.F. had been a victim of sexual abuse. (RP 225-234). The court agreed that such testimony is inadmissible. (Id). Accordingly, Ms. Stover did *not* make a diagnosis of L.M.F. To the extent that Fritz's claim of error is based on this misrepresentation of the record, it fails.

To the extent that Fritz's claim is based on Fritz's decision not to object to Ms. Stover's testimony that the lack of physical findings of penetration was not inconsistent with what L.M.F. reported to her, this claim fails because such testimony is not impermissible.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

But even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." *Strickland* at 693. "In doing so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (*quoting Strickland* at 694). When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn.App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

As in *State v. Kirkman*, 159 Wn. 2d 918, 155 P.3d 125, 133 (2007), Ms. Stover's testimony neither corroborated nor contradicted L.M.F.'s account. It was neutral testimony. The Supreme Court observed, in *Kirkman*:

> We also agree with the State on this issue. Dr. Stirling's testimony was particularly relevant because Candia's jury was presented with what might appear to be a discrepancy:

> C.M.D. alleged that she had been raped numerous times by an adult, but there was no medical evidence to support these allegations. In cross-examination, Candia's counsel focused on C.M.D.'s allegations in order to argue that the medical examination showed that C.M.D. had not been raped as she claimed. Cases involving alleged child sex abuse make the child's credibility "an inevitable, central issue." Where the child's credibility is thus put in issue, a court has broad discretion to admit evidence corroborating the child's testimony.
>
> Dr. Stirling did not come close to testifying on any ultimate fact. He never opined that Candia was guilty nor did he opine that C.M.D. was molested or that he believed C.M.D.'s account to be true.

Kirkman at 933.

It was worth observing that the language used by Dr. Stirling in the *Candia* trial[6] was far stronger than that used by Ms. Stover in this case. Dr. Stirling was asked whether his examination of the victim was consistent with her account to a *reasonable medical certainty. Kirkman* at 931-32. And it does not appear that Dr. Stirling twice opined that one reason for a lack of physical findings might be because the victim was lying about the abuse, as Ms. Stover did. If Dr. Stirling's testimony passed muster in *Kirkman/Candia* (on direct review, no less), then Ms. Stover's testimony also passes muster in this collateral attack.

Because the testimony Fritz now complains about was not inadmissible, he cannot show that an objection to this testimony would

[6] The cases in *State v. Candia* and *State v. Kirkman* were consolidated for Supreme Court review.

have been sustained. Thus, he cannot demonstrate error. Even if he could demonstrate deficient performance in choosing not to object to this testimony, Fritz cannot demonstrate prejudice. Fritz acts as though this case was close--it was not. He *confessed* to sexually abusing L.M.F. to her mother, and the jury evidently found this testimony credible. Ms. Stover's remark that the lack of physical finding of vaginal trauma was not inconsistent with what L.M.F. verbally reported to her likely did not affect the outcome of the case. The testimony was neutral at best. Ms. Stover testified that one of the reasons she might not find physical evidence of sexual abuse is because the abuse did not happen--meaning, that the alleged victim was lying. Ms. Stover was very clear about that, even repeating it twice in her testimony. That testimony was not neutral--it benefitted Fritz.

Trial counsel, who was in the best position to evaluate the impact of this testimony, made a tactical decision not to object, and that decision was reasonable because the testimony was not inadmissible. Ms. Stover did not make a diagnosis pertaining to L.M.F. Fritz has not demonstrated that absent this non-objectionable testimony, the outcome of the trial would probably have been different. This claim should be dismissed.

IV. ISSUE FOUR

Fritz claims that defense counsel was ineffective for choosing not to call as witnesses Dr. Lifton, who purportedly examined L.M.F. months before her disclosure, and LaMaunte Fritz, the defendant's aunt. Fritz has not demonstrated deficient performance.

The State incorporates the legal standard for ineffective assistance of counsel stated in the section above. As to Dr. Lifton, counsel's decision not to call him was a reasonable tactical decision. According to L.M.F.'s mother, L.M.F. complained about pain in her vaginal area so the mother took her to see Dr. Lifton at Kaiser Permanent. (RP 176-77). All Dr. Lifton did was "lift[] up her underwear and said 'She's fine.'" RP 177. Dr. Lifton told L.M.F's mother that she simply had a hygiene problem. (RP 179). It is difficult to imagine how this testimony would have been helpful to Fritz. Contrary to what Fritz claims in his brief, Dr. Lifton would not have contradicted Marsh Stover. This claim is baffling. Dr. Lifton did not do a gynecological examination. Moreover, to the extent his "examination" found no physical evidence of penetration, that is no different than what Marsh Stover found. Interestingly, Fritz does not include in his petition a declaration from either Dr. Lifton or from trial counsel, Brian Walker. His failure to do so is fatal to his claim of ineffective assistance of counsel. Without a declaration from Dr. Lifton

outlining what he would have testified to if called, this Court cannot assume, as Fritz wishes, that his testimony would have been favorable. Additionally, without a declaration from Mr. Walker, this Court cannot assume, as Fritz wishes, that Mr. Walker knew that Dr. Lifton would offer favorable testimony but negligently failed to call him. In fact, in the absence of a declaration from Mr. Walker we can assume the opposite: That Mr. Walker investigated the Dr. Lifton angle and concluded that it would be unfavorable, or, at least, not helpful, to his client. Fritz has not shown that Mr. Walker performed deficiently in electing not to call Dr. Lifton. Further, Fritz cannot show that Dr. Lifton's testimony would have been favorable to him and he therefore cannot show that the result of the trial would probably have been different had Dr. Lifton testified.

As to Fritz's aunt, LaMaunte Fritz, it is inconceivable that a competent attorney would call this woman, with whom the defendant is so close that he co-owns a house[7], as an expert witness on his client's behalf. No reasonable juror would give any credit to the overwhelmingly biased testimony such a witness would have offered. Even worse, calling this witness would have made the defendant look desperate, and it would have made it look as though he tried to secure other medical witnesses to offer favorable testimony that would contradict Marsha Stover but he could not

[7] See RP at 187.

find any. On this claim, we do not need a declaration from Mr. Walker to know why he did not call this witness. It would be nothing short of absurd to have done so. Fritz has not shown deficient performance by Mr. Walker in choosing not to call this witness, and he has not shown that if the defendant's aunt had offered expert testimony (assuming the court would have qualified her as an expert in child sexual abuse), the result of the trial would have been different.

This claim should be dismissed.

V. ISSUE FIVE

In this claim of error, Fritz repackages claims that were made, and decided on their merits, in the direct appeal. Fritz complains that the prosecutor made improper remarks, and that defense counsel was ineffective for not objecting to them.

But this Court already determined, in the direct appeal, that the remarks complained of were, in fact, improper but that they were harmless in the context of the overall trial. See Opinion at Appendix B.

> The petitioner in a personal restraint petition is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 670–72, 101 P.3d 1 (2004) (David I). The interests of justice are served by reconsidering a ground for relief if there has been "an intervening change in the law 'or some other justification for having failed to raise a crucial point or argument in the prior application.'" *In re*

> *Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999) (Gentry II). A petitioner may not avoid this requirement "merely by supporting a previous ground for relief with different factual allegations or with different legal arguments." *Davis* at 671, 101 P.3d 1.

In re Yates, supra, at 17.

Because this Court has already determined that the remarks were harmless error, Fritz cannot demonstrate prejudice. He cannot show that absent the remarks, the result of the trial more likely than not would have been different. This claim should be dismissed because Fritz has not shown why relitigation of the claim is necessary.

VI. ISSUES SIX AND SEVEN

Fritz claims that cumulative error deprived him of a fair trial and that he received ineffective assistance of appellate counsel. Because Fritz has not proven the existence of any error beyond the error that was already found, and determined to be harmless, on direct appeal, he fails to show both cumulative error and ineffective assistance of appellate counsel.

"The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal." *In re Det. of Coe*, 175 Wn.2d 482, 515, 286 P.3d 29 (2012). But where a petitioner is merely alleging errors that were already litigated and deemed harmless on direct appeal,

combined with claimed errors that did not actually occur, there is no cumulative error. See *Yates*, supra, at 65-66.

Likewise, as to ineffective assistance of appellate counsel, Fritz must show that the result of the proceeding would have been different--meaning, he has to show that had counsel raised each of the errors now complained of in the direct appeal, Fritz would have prevailed on appeal and won a new trial. Fritz has not made that showing. Indeed, the only meritorious claim of error he makes in this petition was already found to be harmless by this Court.

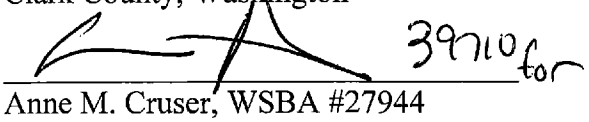
D. CONCLUSION

The petition should be dismissed in its entirety.

DATED this 11 day of August, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:  39710 for
Anne M. Cruser, WSBA #27944
Deputy Prosecuting Attorney

APPENDIX "A"

C

C Brian Walker

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FILED

SEP 14 2010

@ 1:57 PM

Sherry W. Parker, Clerk, Clark Co.

Superior Court of Washington
County of Clark

State of Washington, Plaintiff, vs. BRUCE LEE FRITZ, Defendant. SID: _____ If no SID, use DOB: 10/3/1975	**No. 10-1-00389-4** ✓ **Felony Judgment and Sentence -- Prison** ☒ **RCW 9.94A.507 Prison Confinement** **(Sex Offense and Kidnapping of a Minor)** **(FJS)** 10-9-05941-4 ☒ **Clerk's Action Required, para 2,1, 4.1, 4.3a, 4.3b, 5.2, 5.3, 5.5 and 5.7** ☐ **Defendant Used Motor Vehicle** ☐ **Juvenile Decline** ☐ **Mandatory** ☐ **Discretionary**

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court ***Finds:***

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon
☐ guilty plea ☒ jury-verdict 8/4/2010 ☐ bench trial :

Count	*Crime*	*RCW (w/subsection)*	*Class*	*Date of Crime*
01	RAPE OF A CHILD IN THE FIRST DEGREE	9A.44.073	FA	1/1/2008 to 3/10/2010
02	RAPE OF A CHILD IN THE FIRST DEGREE	9A.44.073	FA	1/1/2008 to 3/10/2010
03	RAPE OF A CHILD IN THE FIRST DEGREE	9A.44.073	FA	1/1/2008 to 3/10/2010
04	RAPE OF A CHILD IN THE FIRST DEGREE	9A.44.073	FA	1/1/2008 to 3/10/2010

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05	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083	FA	1/1/2008 to 3/10/2010
06	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083	FA	1/1/2008 to 3/10/2010

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)

☐ Additional current offenses are attached in Appendix 2.1a.

☒ The defendant is a sex offender subject to indeterminate sentencing under **RCW 9.94A.507.**

The jury returned a special verdict or the court made a special finding with regard to the following:

☐ The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____. RCW 9.94A.839.

☐ The offense was predatory as to Count _____. RCW 9.94A.836.

☐ The victim was under 15 years of age at the time of the offense in Count _____ RCW 9.94A.837.

☐ The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.

☐ The defendant acted with **sexual motivation** in committing the offense in Count _____. RCW 9.94A.835.

☐ This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

☐ The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.825, 9.94A.533.

☐ The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____ _____. RCW 9.94A.825, 9.94A.533.

☐ Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

☐ The defendant committed a crime involving the manufacture of methamphetamine including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

☐ Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that **minor** in the commission of the offense. RCW 9.94A.833.

☐ Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.____.

☐ The defendant committed ☐ **vehicular homicide** ☐ **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.

☐ Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.

☐ Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW46.20.285.

☐ The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

☐ The crime(s) charged in Count _____ involve(s) **domestic violence. RCW 10.99.020.**

☐ Counts _____ encompass the same criminal conduct and countas one crime in determining the offender score (RCW 9.94A.589).

☐ **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	Crime	Cause Number	Court (county & state)
1.			

☐ Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	DV?*	Type
1	NO FELONY CONVICTIONS						

*DV: Domestic Violence was pled and proved

☐ Additional criminal history is attached in Appendix 2.2.

☐ The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

☐ The prior convictions for _____ are one offense for purposes of determining the offender score (RCW 9.94A.525).

☐ The prior convictions for _____ are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term	Maximum Fine
01	9	XII	240 MONTHS to 318 MONTHS	None	240 MONTHS to 318 MONTHS	LIFE	$50,000.00
02	9	XII	240 MONTHS to 318 MONTHS	None	240 MONTHS to 318 MONTHS	LIFE	$50,000.00
03	9	XII	240 MONTHS to 318 MONTHS	None	240 MONTHS to 318 MONTHS	LIFE	$50,000.00
04	9	XII	240 MONTHS to 318 MONTHS	None	240 MONTHS to 318 MONTHS	LIFE	$50,000.00
05	9	X	149 MONTHS to 198 MONTHS	None	149 MONTHS to 198 MONTHS	LIFE	$50,000.00
06	9	X	149 MONTHS to 198 MONTHS	None	149 MONTHS to 198 MONTHS	LIFE	$50,000.00

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.

☐ Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders recommended **sentencing agreements or plea agreements** are ☐ attached ☐ as follows: _____.

2.4 ☒ **Exceptional Sentence.** The court finds substantial and compelling reasons that justify an exceptional sentence:

☐ below the standard range for Count(s) _____.

☒ above the standard range for Count(s) 1, 2, 3, 4, 5, 6

☐ The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

☒ Aggravating factors were ☐ stipulated by the defendant, ☐ found by the court after the defendant waived jury trial, ☒ found by jury, by special interrogatory. One aggravator found by judge

☐ within the standard range for Count(s) _____ but served consecutively to Count(s) _____.

Findings of fact and conclusions of law are attached in Appendix 2.4. ☐ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. Thecourt finds:

☒ That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____.

☐ The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is ***guilty*** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 ☐ The court ***dismisses*** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) ***Confinement.*** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

360 months on Count 01 — 360 months on Count 02

360 months on Count 03 — 360 months on Count 04

360 months on Count 05 — 360 months on Count 06

☐ The confinement time on Count(s)_____ contain(s) a mandatory minimum term of _____.

☐ The confinement time on Count_____ includes _____ months as enhancement for ☐ firearm ☐ deadly weapon ☐ sexual motivation ☐ VUCSA in a protected zone ☐ manufacture of methamphetamine with juvenile present ☐ sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is: 360 Months.

All counts shall be served concurrently, except for the portion ofthose counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:_____.

The sentence herein shall run consecutively with any other sentencepreviously imposed in any other case, including other cases in District Court or Superior Court, unless otherwise specified herein:

_____.

Confinement shall commence immediately unless otherwise set forth here:_____

_____.

The total time of incarceration and community supervision shall not exceed the statutory maximum for the crime.

(b) ***Confinement***. RCW 9.94A.507 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count	01	minimum term	360 months	maximum term	Statutory Maximum	Life
Count	02	minimum term	360 months	maximum term	Statutory Maximum	Life
Count	03	minimum term	360 months	maximum term	Statutory Maximum	Life
Count	04	minimum term	360 months	maximum term	Statutory Maximum	Life
Count	05	minimum term	360 months	maximum term	Statutory Maximum	Life
Count	06	minimum term	360 months	maximum term	Statutory Maximum	Life

(c) ***Credit for Time Served***: The defendant shall receive 44 days credit for time served prior to sentencing for confinement that was solely under this cause number. RCW 9.94A.505. The jail shall compute earned early release credits (good time) pursuant to its policies and procedures.

(d) ☐ ***Work Ethic Program***. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for remaining time of confinement.

4.2 Community Custody . (To determine which offenses are eligible for or required for community placement or community custody see RCW 9.94A.701)

(A) The defendant shall be on community placement or community custody for the longer of:

(1) the period of early release. RCW 9.94A.728(1)(2); or

(2) the period imposed by the court, as follows:

Count(s) _____ 36 months Sex Offenses
Count(s) _____ 36 months for Serious Violent Offenses
Count(s) _____ 18 months for Violent Offenses
Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(Sex offenses, only) For count(s) 01, 02, 03, 04, 05, 06, sentenced under RCW 9.94A.507, for any period of time the defendant is released from total confinement before the expiration of the statutory maximum.

The total time of incarceration and community supervision/custody shall not exceed the statutory maximum for the crime.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody;(6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm

compliance with the orders of the court; (9) for sex offenses, submit to electronic monitoring if imposed by DOC; and (10) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody. For sex offenders sentenced under RCW 9.94A.709, the court may extend community custody up to the statutory maximum term of the sentence.

The court orders that during the period of supervision the defendant shall:

☐ consume no alcohol.

☒ have no contact with: L.M.F. (female DOB 5/7/2004)

☐ remain ☐ within ☐ outside of a specified geographical boundary, to wit:

_____.

☒ not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). RCW 9.94A.030(8).

☐ participate in the following crime-related treatment or counseling services:

_____.

☐ undergo an evaluation for treatment for ☐ domestic violence ☐ substance abuse ☐ mental health ☐ anger management, and fully comply with all recommended treatment._____

☐ comply with the following crime-related prohibitions:_____

_____

_____.

☒ Additional conditions are imposed in Appendix 4.2, if attached or are as follows:

See Attached Appendix A and Attached Appendix F

_____

_____.

(C) For sentences imposed under RCW 9.94A.507, the Indeterminate Sentence Review Board may impose other conditions (including electronic monitoring if DOC so recommends). In an emergency, DOC may impose other conditions for a period not to exceed seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3a Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE			
RTN/RJN	$To be set	Restitution to: _____ (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
PCV	$ 500.00	Victim assessment	RCW 7.68.035
PDV	$_____	Domestic Violence assessment	RCW 10.99.080
CRC	$_____	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee $ 200.00	FRC
		Witness costs $ To be set	WFR
		Sheriff service fees $_____	SFR/SFS/SFW/WRF
		Jury demand fee $250.00	JFR
		Extradition costs $_____	EXT
		Other $_____	

PUB	$ _____	Fees for court appointed attorney	RCW 9.94A.760
	$_____	Trial per diem, if applicable.	
WFR	_____	Court appointed defense expert and other defense costs	RCW 9.94A.760
	$_____	DUI fines, fees and assessments	
FCM/MTH	$ 500.00	Fine RCW 9A.20.021; ☐ VUCSA chapter 69.50 RCW, ☐ VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	$_____	Drug enforcement Fund # ☐ 1015 ☐ 1017 (TF)	RCW 9.94A.760
	$ 100.00	DNA collection fee	RCW 43.43.7541
CLF	$_____	Crime lab fee ☐ suspended due to indigency	RCW 43.43.690
FPV	$_____	Specialized forest products	RCW 76.48.140
RTN/RJN	$_____	Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI only, $1000 maximum) Agency: _____	RCW 38.52.430
	$_____	Other fines or costs for:_____	
	$_____	***Total***	RCW 9.94A.760

☒ The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

☒ shall be set by the prosecutor.

☐ is scheduled for_____(date).

☐ The defendant waives any right to be present at any restitution hearing (sign initials):_____.

☐ ***Restitution*** Schedule attached.

☐ Restitution ordered above shall be paid jointly and severally with:

RJN

Name of other defendant	Cause Number	Victim's name	Amount

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than $ 100.00 per month commencing upon release . RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

☐ The court orders the defendant to pay costs of incarceration at the rate of $_____ per day, (actual costs not to exceed $100 per day). (*JLR*) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.3b ☐ Electronic Monitoring Reimbursement. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of $_____.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. Theappropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

☒ ***HIV Testing.*** The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

☒ The defendant shall not have contact with LMF (female, 5/17/2001) including, but not limited to, personal, verbal, telephonic, written or contact through a third party forLIFE (which does not exceed the maximum statutory sentence).

☒ The defendant is excluded or prohibited from coming within:

☐ 500 feet ☐ 880 feet ☒ 1000 feet of:

☒ LMF (female, 5/17/2001) (name of protected person(s))'s

☒ home/ residence ☒ work place ☒ school

☒ (other location(s)) person

☐ other location _____,

for LIFE (which does not exceed the maximum statutory sentence).

☒ A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 O ther: _____

_____

_____

_____.

4.7 Off -Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

_____.

4.8 For Offenders on Community Custody, when there isreasonable cause to believe that the defendant has violated a condition or requirement of this sentence, the defendant shall allow, and the Department of Corrections is authorized to conduct, searches of the defendant's person, residence, automobile or other personal property. Residence searches shall include access, for the purpose of visual inspection, all areas of the residence in which the defendant lives or has exclusive/joint control/access and automobiles owned or possessed by the defendant.

4.9 If the defendant is removed/deported by the U.S. Immigration and Customs Enforcement, theCommunity Custody time is tolled during the time that the defendant is not reporting for supervision in the United States. The defendant shall not enter the United States without the knowledge and permission of the U.S. Immigration and Customs Enforcement. If the defendant re-enters the United States, he/she shall immediately report to the Department of Corrections if on community custody or the Clerk's Collections Unit, if not on Community Custody for supervision.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation.

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 Firearms. You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040 and RCW 9.41.047.

5.6 Sex and Kidnapping Offender Registration. Laws of 2010, ch. 367 § 1, 10.01.200.

1. General Applicability and Requirements: Because this crime involves unlawful imprisonment involving a minor as defined in Laws of 2010, ch. 367 § 1, you are required to register.

If you are a resident of Washington you must register with the sheriff of the county of the state of Washington where you reside. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of the state of Washington where you will be residing.

If you are not a resident of Washington but you are a student in Washington, or you are employed in Washington, or you carry on vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of your school, where you are employed, or where you carry on a vocation.

2. Offenders Who are New Residents or Returning Washington Residents: If you move to Washington or if you leave the state following your sentencing or release from custody but later move back

to Washington, you must register within three business days after moving to this state. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state.

3. Change of Residence Within State: If you change your residence within a county, you must provide, by certified mail, with return receipt requested or in person, signed written notice of your change of residence to the sheriff within three business days of moving. If you change your residence to a new county within this state, you must register with the sheriff of the new county within three business days of moving. Also within three business days, you must provide, by certified mail, with reutrn receipt requested or in person, signed written notice of your change of address to the sheriff of the county where you registered.

4. Leaving the State or Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within three business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. If you move out of the state, you must also send written notice within three business days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within three business days prior to arriving at the institution. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within three business days prior to beginning to work at the institution. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within three business days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent toattend the school. You must notify the sheriff withinthree business days prior to arriving at the school to attend classes. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within three business days of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within three business days after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register with the sheriff of the new county not more than three business days after entering the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You must keep an accurate accounting of where you stay during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within three business days of the entry of the order. RCW 9A.44.130(7).

8. Length of Registration:

☒ Class A felony – Life; ☐ Class B Felony – 15 years; ☐ Class C felony – 10 years

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commision of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revokeyour driver's license. RCW 46.20.285.

5.8 Other: _____.

5.9 Persistent Offense Notice

The crime(s) in count(s) 01, 02, 03, 04, 05, 06 is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030, 9.94A.570

The crime(s) in count(s) 1, 2, 3, 4, 5, 6 is/are one of the listed offenses in RCW 9.94A.030.(31)(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

Done in Open Court and in the presence of the defendant this date: September 14, 2010

Judge/Print Name John Nichols

Deputy Prosecuting Attorney	Attorney for Defendant	Defendant
WSBA No. 36726	WSBA No. 27391	Print Name:
Print Name: Anna M. Klein	Print Name: Brian A. Walker	BRUCE LEE FRITZ

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subjectto community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financialobligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: BLF not guilty

I am a certified or registered interpreter, or the court has found me otherwise qualifiedto interpret, in the _____ _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is ture and correct.

Signed at Vancouver, Washington on (date): _____

_____ _____

Interpreter Print Name

I, Sherry Parker, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk

Identification of the Defendant

BRUCE LEE FRITZ

10-1-00389-4

SID No: _____ Date of Birth: 10/3/1975
(If no SID take fingerprint card for State Patrol)

FBI No. Local ID No. 201726

PCN No. _____ Other _____

Alias name, DOB:

Race: W **Ethnicity:** **Sex:** M

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, _____ Dated: 09-14-2010

Seal of the Superior Court STATE OF WASHINGTON Of Clark County

The defendant's signature: _____

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously

SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. BRUCE LEE FRITZ, Defendant. SID: _____ DOB: 10/3/1975	NO. 10-1-00389-4 **WARRANT OF COMMITMENT TO STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS**

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
01	RAPE OF A CHILD IN THE FIRST DEGREE	9A.44.073	1/1/2008 to 3/10/2010
02	RAPE OF A CHILD IN THE FIRST DEGREE	9A.44.073	1/1/2008 to 3/10/2010
03	RAPE OF A CHILD IN THE FIRST DEGREE	9A.44.073	1/1/2008 to 3/10/2010
04	RAPE OF A CHILD IN THE FIRST DEGREE	9A.44.073	1/1/2008 to 3/10/2010
05	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083	1/1/2008 to 3/10/2010
06	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083	1/1/2008 to 3/10/2010

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be

designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of :

COUNT	CRIME	TERM
01	RAPE OF A CHILD IN THE FIRST DEGREE	360 Days/Months
02	RAPE OF A CHILD IN THE FIRST DEGREE	360 Days/Months
03	RAPE OF A CHILD IN THE FIRST DEGREE	360 Days/Months
04	RAPE OF A CHILD IN THE FIRST DEGREE	360 Days/Months
05	CHILD MOLESTATION IN THE FIRST DEGREE	360 Days/Months
06	CHILD MOLESTATION IN THE FIRST DEGREE	360 Days/Months

These terms shall be served concurrently to each other unless specified herein:

The defendant has credit for 44 days served.

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

And these presents shall be authority for the same.

HEREIN FAIL NOT.

WITNESS, Honorable [signature]

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE: Sept. 14, 2010

SHERRY W. PARKER, Clerk of the
Clark County Superior Court

By: [signature]
Deputy

Seal of the Superior Court STATE OF WASHINGTON Of Clark County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. BRUCE LEE FRITZ, Defendant	No. 10-1-00389-4 DECLARATION OF CRIMINAL HISTORY

COME NOW the parties, and do hereby declare, pursuant to RCW 9.94A.100 that to the best of the knowledge of the defendant and his/her attorney, and the Prosecuting Attorney's Office, the defendant has the following undisputed prior criminal convictions:

CRIME	COUNTY/STATE CAUSE NO.	DATE OF CRIME	DATE OF SENTENCE	PTS.
NO FELONY CONVICTIONS				

☐ The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360.

DATED this 14th day of ~~March~~ September, 2010.

Defendant

Attorney for Defendant

Anna M. Klein, WSBA #36726
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTING ATTORNEY
CHILDREN'S JUSTICE CENTER
PO BOX 61992
VANCOUVER, WASHINGTON 98666
(360) 397-6002 (OFFICE)
(360) 695-1760 (FAX)

Superior Court of Washington
County of

State of Washington, Plaintiff, vs. **Bruce Lee Fritz**, Defendant.	**No. 10-1-00389-4** **Findings of Fact and Conclusions of Law for an Exceptional Sentence** **(Appendix 2.4B Judgment and Sentence)** **(Optional)** **(FNFCL)**

The court imposes upon the defendant an exceptional sentence [X] above [ ] within [ ] below the standard range based upon the following Findings of Fact and Conclusions of Law:

Findings of Fact

I. The exceptional sentence is justified by the following aggravating circumstances:

(a) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c).

(b) The defendant used his position of trust or confidence to facilitate the commission of the current offense. RCW 9.94A.535(3)(n).

(c) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time RCW 9.94A.535(3)(g).

[X] The grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This court would impose the same sentence if only one of the grounds listed in the preceding paragraph is valid.

II. _____

Conclusions of Law

I. There are substantial and compelling reasons to impose an exceptional sentence pursuant to RCW 9.94A.535.

II. _____

Dated: September 14, 2010

Judge/Print Name: John F. Nichols

Deputy Prosecuting Attorney WSBA No. 36726 Print Name: Anna M. Klein	Attorney for Defendant WSBA No. 27391 Print Name: Brian A. Walker	Defendant Print Name: Bruce Lee Fritz

"APPENDIX A"
9.94A.507

STIPULATED CONDITIONS OF SENTENCE/COMMUNITY CUSTODY

1. You shall commit no law violations.

2. You shall report to and be available for contact with the assigned community corrections officer as directed.

3. You shall work at a Department of Corrections approved education program, employment program, and/or community service program as directed.

4. You shall not possess, consume, or deliver controlled substances, except pursuant to a lawfully issued prescription.

5. You shall pay a community placement/supervision fee as determined by the Department of Corrections.

6. You shall not have any direct or indirect contact with the victims, including but not limited to personal, verbal, telephonic, written, or through a third person without prior written permission from his community corrections officer, his therapist, the prosecuting attorney, and the court only after an appropriate hearing. This condition is for the statutory maximum sentence of _____LIFE____ years, and shall also apply during any incarceration.

   VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 10.99 RCW AND WILL SUBJECT THE VIOLATOR TO ARREST; ANY ASSAULT OR RECKLESS ENDANGERMENT THAT IS A VIOLATION OF THIS ORDER IS A FELONY.

7. You shall not enter into or frequent business establishments or areas that cater to minor children without being accompanied by a responsible adult. Such establishments may include but are not limited to video game parlors, parks, pools, skating rinks, school grounds, malls or any areas routinely used by minors as areas of play/recreation.
   AREAS WHERE MINORS ARE KNOWN TO CONGREGATE

8. You shall not have any contact with minors. This provision begins at time of sentencing. This provision shall not be changed without prior written approval by the community corrections officer, the therapist, the prosecuting attorney, and the court after an appropriate hearing. Defendant may have contact with his son, R.L.F. 8/27/1994 (male)

9. You shall remain within, or outside of, a specified geographical boundary as ordered by your community corrections officer.

10. Your residence location and living arrangements shall be subject to the prior approval of your community corrections officer and shall not be changed without the prior knowledge and permission of the officer.

11. You must consent to allow home visits by Department of Corrections to monitor compliance with supervision. This includes search of the defendant's person, residence, automobile, or other personal property, and home visits include access for the purposes of inspection of all areas the defendant lives or has exclusive/joint control or access. RCW 9.94A.631

12. Your employment locations and arrangements shall be subject to prior approval of your community corrections officer and shall not be changed without the prior knowledge and permission of the officer.

13. You shall not possess, use, or own any firearms or ammunition.

14. ☐ You shall not possess or consume alcohol.

15. ☐ You shall submit to urine, breath, or other screening whenever requested to do so by the program staff or your community corrections officer.

16. ☐ You shall not possess any paraphernalia for the use of controlled substances.

17. ☐ You shall not be in any place where alcoholic beverages are the primary sale item.

18. ☐ You shall take antabuse per community corrections officer's direction.

19. You shall attend an evaluation for abuse of ☐drugs, ☐alcohol, ☐mental health, ☐anger management, or ☐parenting and shall attend and successfully complete all phases of any recommended treatment as established by the community corrections officers and/or treatment facility.

20. You shall enter into, cooperate with, fully attend and successfully complete all inpatient and outpatient phases of a Washington State certified sexual deviancy treatment program as established by the community corrections officer and/or the treatment facility. You shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, community corrections officer and shall not change providers without court approval after a hearing if the prosecutor and/or community corrections officer object to the change. "Cooperate with" means you shall follow all treatment directives, accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity.

21. The sex offender therapist shall submit quarterly reports on your progress in treatment to the court, Department of Corrections, and prosecutor and you shall execute a release of information to the community corrections officer, prosecutor and the court so that the treatment provider can discuss the case with them. The quarterly report shall reference

the treatment plan and include the following, at a minimum: dates of attendance, your compliance with requirements, treatment activities, and your relative progress in treatment.

22. During the time you are under order of the court, you shall, at your own expense, submit to polygraph examinations at the request of the Community Corrections Order and/or the Prosecuting Attorney's office (but in no event less than twice yearly). Copies shall be provided to the Prosecuting Attorney's office upon request. Such exams will be used to ensure compliance with the conditions of community supervision/placement, and the results of the polygraph examination can be used by the State in revocation hearings.

23. You shall submit to plethysmography exams, at your own expense, at the direction of the community corrections officer and copies shall be provided to the Prosecutor's Office upon request.

24. You shall register as a sex offender with the County Sheriff's Office in the county of residence as defined by RCW 9.94A.030.

25. You shall not use/possess sexually explicit material as defined in RCW 9.68.130(2).

26. You shall sign necessary release information documents as required by Department of Corrections or the Prosecuting Attorney, to monitor your compliance with any of the conditions of this Judgment and Sentence. And, you shall stipulate that the Prosecuting Attorney can disseminate copies of any psychosexual evaluations and polygraph tests in this matter to the ISRB.

27. If the offense was committed on or after July 24, 2005, you may not reside within eight hundred eighty (880) feet of the facilities and grounds of a public or private school. RCW 9.94A.030

28. If you are in the SSOSA program you shall enter into sex offender treatment with a State certified provider within thirty (30) days of sentencing or release from custody, whichever comes first.

29. If you are in the SSOSA program, your treatment plan shall include polygraph exams as set forth in condition number 19. Your treatment provider and/or the defendant will be required to provide quarterly reports on March 1, June 1, September 1, and December 1 (including the polygraph results) of your compliance with the conditions of treatment. These reports shall go to the community corrections officer and the prosecuting attorney's office. Failure to comply with this provision shall be grounds for the court to mandate transfer of the patient to a different treatment provider.

The undersigned defendant agrees that he has read this Appendix A, or it has been read and explained to him; that he understands it, agrees with it, and has no questions about it. This is a binding agreement upon the undersigned defendant that is entered into knowingly, voluntarily and intelligently, as part of the plea of guilty and Judgment and Sentence.

Dated: _____ Signed: _____

Print name: <<DEFENDANT>>
Defendant

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON	)	**Cause No.: 10-1-00389-4**
	)	
Plaintiff	)	**JUDGEMENT AND SENTENCE (FELONY)**
v.	)	**APPENDIX F**
FRITZ, Bruce Lee	)	**ADDITIONAL CONDITIONS OF SENTENCE**
Defendant	)	
	)	
DOC No. 342644	)	

CRIME RELATED CONDITIONS:

1) No contact with the victim
2) No contact with anyone under the age of eighteen
3) Do not possess or use pornography/sexually explicit material
4) Enter into, fully attend, cooperate with, and successfully complete all inpatient and outpatient phases of a Washington State certified sexual deviancy treatment program
5) Participate in polygraph examinations as directed by the Department of Corrections

9/14/10
DATE

JUDGE, CLARK COUNTY SUPERIOR COURT

Lisa Gay / LG / 09-130.ntf
09/02/10

APPENDIX "B"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRUCE LEE FRITZ, Appellant.	No. 41302-7-II UNPUBLISHED OPINION

WORSWICK, C.J. — Bruce Lee Fritz appeals his convictions for four counts of first degree child rape and two counts of first degree child molestation of his stepdaughter LMF.[1] Fritz argues that the prosecutor committed misconduct during closing arguments at his jury trial by (1) arguing that the jury had to find Fritz guilty unless it found LMF was lying about the abuse, and (2) repeatedly referring to Fritz having destroyed LMF's innocence. We hold that while the prosecutor's remarks were improper, Fritz failed to meet his burden on appeal to show that no curative instruction would have obviated any prejudicial effect on the jury. Accordingly, we affirm.

FACTS

When LMF was eight years old, she disclosed to her mother that Fritz had tried to have sex with her fifteen or more times. After LMF's mother confronted Fritz, he confessed to having rubbed his penis on LMF's privates twice. LMF also informed her grandmother that Fritz had performed oral sex on her.

[1] We use LMF's initials to protect her privacy.

Detective Aaron Holladay interviewed LMF about the abuse after it was disclosed to the police. LMF gave additional details to Detective Holladay, including that the abuse began when she was six years old. She told Detective Holladay that Fritz sexually abused her approximately twenty times at an apartment where they used to live, and at least thirty times at the house where they lived more recently. LMF made additional statements about the abuse to a nurse practitioner who examined her, including that Fritz threatened that she would lose her family and live under a bridge if she told anyone.

The State charged Fritz with four counts of first degree child rape and two counts of first degree child molestation. At a jury trial, the above-noted witnesses testified as to LMF's statements to them about the abuse. LMF's mother testified about Fritz's confession. And LMF also testified about Fritz's sexual abuse. Fritz did not testify or put on any evidence.

During closing argument, the prosecutor made repeated references to how Fritz destroyed LMF's innocence. The prosecutor first argued:

> There are few things in this world that we value more than the innocence and purity of a young child. We, as a society, entrust parents with the responsibility of safeguarding that innocence and purity. A father, in particular, has the duty and obligation to protect his children from harm, to keep them safe and to safeguard them from the evils of this world, to protect their innocence.
>
> That defendant, Bruce Lee Fritz, horribly abused that ultimate position of trust. He destroyed the very thing that he was entrusted to protect, little [LMF's] innocence.

3 Report of Proceedings (RP) at 363-64. The prosecutor further argued at the end of her closing argument:

> I know that the testimony that you have had to hear in this case is extremely unpleasant, horrible, disturbing. But, let us not forget that [LMF] lived it. She had to live that. That man used his position as protector, guardian to destroy her

> innocence. And, he needs to be held accountable for that. The only verdict in this case is guilty and I respectfully ask you to do the right thing and to find him guilty and hold him accountable for taking her innocence.

3 RP at 373-74. And the prosecutor finally argued at the end of her rebuttal:

> I know that you have a hard job but you should have an abiding belief that he is guilty based on the evidence that you have heard. And, I ask you to hold him accountable for destroying [LMF's] innocence and find him guilty for what he did.

3 RP at 409.

The prosecutor also argued that the jury was required to disbelieve LMF in order to find Fritz not guilty:

> In order to believe that that defendant is not guilty, in order to not believe that what [LMF] is saying is true, you have to believe that she is a master manipulator, really sick and twisted, academy award winning actress, I mean, really smart because how else has she been able to maintain what she is saying all—with all of these people that have talked to her? With her mom? With her grandma? Detective Holladay, with Nurse Stover? With the defense attorney interview? Here in court in front of all of you? Man, she's good. If she [sic] not telling the truth, she is good.
>
> . . . .
>
> And, she has also got to be pretty sick to come up with all of that, to tell everyone all of that, to go through a medical exam and have her genitals probed, to come here and testify in front of you. You've got to believe she [sic] pretty messed up.
>
> It's not the adult. It's not him who is twisted. No, it's this little girl. It's ridiculous.

3 RP at 405-07. Fritz objected to none of these arguments.

The trial court properly instructed the jury as to the presumption of innocence, the standard of proof beyond a reasonable doubt, and the need for the jury to decide the case based on the evidence rather than sympathy, prejudice, or personal preference. The jury found Fritz

guilty of all four counts of first degree child rape and both counts of first degree child molestation. Fritz appeals.

ANALYSIS

Fritz argues that prosecutorial misconduct denied him a fair trial, warranting reversal of his convictions. We hold that the prosecutor's arguments that the jury must disbelieve LMF to acquit Fritz and the prosecutor's repeated references to Fritz destroying LMF's innocence were improper.[3] But we further hold that because Fritz failed to object to these comments below and because the comments did not result in prejudice incurable by a jury instruction, Fritz's arguments fail. We accordingly affirm Fritz's convictions.

A. *Comments Were Improper*

To establish prosecutorial misconduct, Fritz first bears the burden to establish that the prosecutor's statements were improper. *State v. Emery*, ___ Wn.2d ___, 278 P.3d 653, 663 (2012). This court reviews a prosecutor's purportedly improper remarks in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).

---

[3] Fritz also incorrectly argues that the prosecutor committed misconduct by appealing to the jury's passion and prejudice when she argued that testifying was "not fun" for LMF:

> A little child had to come in here and tell all of you about these horrible things that happened to her and be cross-examined by the defense attorney. Do you think that was fun for her? Obviously, it wasn't. And, you saw her demeanor and you saw a frightened little girl up here. This is not fun for her. None of it is fun.

3 RP at 371. This argument properly addressed LMF's credibility, asserting that she was truthful because she would not otherwise have put herself through the ordeal of testifying. A prosecutor has wide latitude to argue reasonable inferences regarding a witness's credibility. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Fritz cites no authority for such statements constituting improper appeals to passion or prejudice and this argument fails.

Fritz argues that the prosecutor's argument that the jury must disbelieve LMF to find Fritz not guilty was improper. The State concedes that this argument was improper, and we agree. It is well settled, per *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), that a prosecutor may not argue that the jury must disbelieve the State's evidence to acquit the defendant.

The jury here was required to acquit Fritz unless it found the State had proved its case beyond a reasonable doubt. The jury was not required to convict Fritz unless it believed LMF was a sick and twisted master manipulator, as the prosecutor argued. As such, this argument misstated the burden of proof and the jury's role. *Fleming*, 83 Wn. App. at 213. In accordance with *Fleming*, we hold that this argument was improper.

Fritz also argues that the prosecutor's repeated references to Fritz destroying LMF's innocence were improper. Again, we agree.

"Mere appeals to the jury's passion or prejudice are improper." *Gregory*, 158 Wn.2d at 808 (citing *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). But "'[a] prosecutor is not muted because the acts committed arouse natural indignation.'" *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006) (quoting *State v. Fleetwood*, 75 Wn.2d 80, 84, 448 P.2d 502 (1968)). A prosecutor is not barred from referring to the heinous nature of a crime, but retains the duty to ensure a verdict "free of prejudice and based on reason." *State v. Claflin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984).

Here, the prosecutor's repeated references to Fritz destroying LMF's innocence were nothing more than appeals to the jury's passion and prejudice. The jury was required to determine whether the State had proved every element of the charged crimes, not to hold Fritz

accountable for destroying LMF's innocence. These comments accordingly served no purpose except to evoke the jury's sympathy for L.M.F and arouse the jury's prejudice against Fritz. Hence, they were improper.

B. *Comments Did Not Result in Prejudice Incurable by a Jury Instruction*

Because Fritz did not object to the statements at trial, he is held to a heightened standard of review. Fritz must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury'" and (2) the misconduct resulted in prejudice that "'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 278 P.3d at 664 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). Our query is, "'[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?'" *Emery*, 278 P.3d at 665 (second alteration in original) (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

Under *Emery*, our analysis focuses less on whether the conduct was flagrant or ill intentioned and more on whether a jury instruction could have cured the prejudice that the prosecutor's remarks caused. 278 P.3d at 665. While the prosecutor here made the same argument held improper almost 16 years ago in *Fleming*, the prejudice this argument created could have been cured by a jury instruction.

We reach this result under *Emery*, which addressed comments that analogously misstated the burden of proof and the jury's role. There, the prosecutor argued that the jury must be able to articulate a reason for any reasonable doubt as to the defendant's guilt, and argued that the jury's role was to "speak the truth" of what happened in the case. *Emery*, 278 P.3d at 659 (quoting 9 Verbatim Report of Proceedings at 830-32). The court held that these arguments were curable

by a jury instruction because they were not "'inflammatory'" comments that caused an incurable prejudice in the minds of the jury. 278 P.3d at 665 (quoting *State v. Brett*, 126 Wn.2d 136, 180, 892 P.2d 29 (1995)). Rather, the court held that the comments carried the potential to confuse the jury about its role and the burden of proof, which would have been cured by the trial court explaining said role and reiterating that the State bears the burden of proof. 278 P.3d at 665-66.

Similarly here, the prosecutor's argument that the jury had a duty to convict unless it found LMF to be lying misstated the burden of proof. But just as in *Emery*, any prejudice resulting from this improper argument would have been alleviated by the trial court reiterating that the State bore the burden of proof and that the jury's role was to decide whether the State had met this burden. Because the prejudice that this argument caused was curable by a jury instruction, Fritz's argument that it warrants reversal of his convictions fails.

The same analysis holds for the prosecutor's references to Fritz destroying LMF's innocence. While these comments were improper appeals to the jury's passion and prejudice, they were not so inflammatory that an instruction from the trial court to disregard the prosecutor's improper comments would have failed to cure any prejudice. *Cf. Belgarde*, 110 Wn.2d at 506-07 (prosecutor appealed to passion and prejudice by claiming defendant was affiliated with terrorist organization); *State v. Reed*, 102 Wn.2d 140, 143-46, 684 P.2d 699 (1984) (prosecutor appealed to passion and prejudice by repeatedly calling defendant a liar and by implying witnesses should not be believed because they were from out of town and drove fancy cars). And while these arguments could have influenced the jury by suggesting it should find Fritz guilty if it concluded he destroyed LMF's innocence, a jury instruction would have cured any such confusion about the burden of proof.

Because Fritz failed to object to these arguments below, he is required to meet a heightened standard of review by showing that the comments engendered an incurable feeling of prejudice in the mind of the jury. And because Fritz cannot make this showing, his arguments fail. We accordingly affirm his convictions.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Hunt, J.

Johanson, J.